90-1240

Supreme Court, U.S.
FILED
FEB 5 1991
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STEVEN ALLISON,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STANLEY P. KLEIN,
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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in conducting its own de novo review of the record and finding that Petitioner had not established a prima facie case of discrimination under Batson v. Kentucky, instead of giving due deference to the district court's implicit finding to the contrary, or remanding for clarification of the basis for the district court's ruling on the Batson issue?

2. Whether the Court of Appeals erred in holding that the prosecutor's use of three peremptory challenges to exclude members of a black defendant's race from the petit jury does not establish a prima facie case of discrimination, primarily on the ground that other blacks were seated in the petit jury?

3. Whether the reasons advanced by the prosecutor for using three peremptory challenges to strike black venirepersons

were insufficient to satisfy the prosecutor's burden to articulate a clear, reasonably specific and racially neutral explanation for striking the black jurors who were challenged by the prosecutor?

LIST OF PARTIES

In addition to the parties appearing in the caption, Anthinino Galloway was a co-defendant in the proceedings below.

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OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is reported at 908 F. 2d 1531 and is reprinted in the Appendix herein. (7a) The Eleventh Circuit's Order denying Allison's Petition For Re-Hearing and Suggestion For Re-Hearing In Banc is unreported. (44a) The Decision of the United States District Court for the Middle District of Florida is also unreported. (1a)

JURISDICTION

The opinion of the Court of Appeals was entered August 17, 1990. The Court of Appeals denied Allison's Petition For Re-Hearing on November 8, 1990. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War on public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Factual Background and Proceedings Below

On July 13, 1988, Petitioner, a black

male, was indicted by a grand jury in the United States District Court for the Middle District of Florida, Orlando Division. In Count One, Allison was charged with conspiracy to distribute cocaine hydrochloride, a controlled substance, in violation of Title 21, U.S.C. Section 846. In Count Two, Allison was charged with attempting to possess with intent to distribute cocaine hydrochloride, in violation of Title 21, U.S.C. Section 841(a)(1) and Title 18, U.S.C. Section 2. At the trial of this case, which commenced on September 6, 1988[1] in the United States District Court for the Middle District of Florida, a panel of forty proposed jurors was selected by the court. After voir dire examination of the prospective jurors was completed, four members of the jury panel

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[1] Co-defendant Anthinino Galloway is also a black male.

were stricken for cause, and the parties then began the process of making their peremptory challenges to the thirty-six remaining members of the jury panel. After the prosecutor peremptorily challenged a prospective black juror for the second time and counsel began to raise a Batson v. Kentucky, 476 U.S. 79 (1986) issue to the trial court, the court at least implied that it believed that a prima facie case of discrimination had been made because it stated to the prosecutor that it could then require him to make a statement as to why he was excluding blacks. After the court went on and concluded its voir dire and another black juror had been peremptorily challenged by the prosecutor the following colloquy took place:

THE COURT: We need to select an alternate and the reason for challenging the two blacks.

MR. RUBIN: Three.

MR. HAYWARD: I didn't know--

MR. RUBIN: He was a good man, too.

MR. MATTHEWS: Right, right.

MR. HAYWARD: I didn't realize that, Your Honor. I don't know. Well, I originally struck two blacks because I wanted other individuals that were behind them. I preferred them more on the jury.

The Government did not strike two other people who were black. I don't think there's any systematic exclusion of blacks.

THE COURT: The Government denies there's any racial motivation to the strikes. Is that what you're saying?

MR. HAYWARD: Yes.

THE COURT: All right. I will allow the case to proceed on that basis.

MR. RUBIN: We would object given the fact he-- all he stated was a general statement it was not racially motivated. He didn't have a reason why they would strike.

THE COURT: Are you saying the reason he wanted the others more than the ones he struck is insufficient?

MR. RUBIN: I say that, Your Honor, as counsel for Mr. Galloway there's been no reason given why he struck the two blacks. He just said I prefer the next ones better. That's not sufficient.

MR. HAYWARD: I don't believe that I should-- who I say-- I didn't strike the first lady, who was black, because of various reasons. There are various reasons that you pick a jury.

THE COURT: I think you need-- the cases are getting increasingly inquisitive as to the reasons for striking because of problems with racially motivated strikes.

MR. HAYWARD: There are various reasons, Your Honor. I can only allude to various factors which the courts go over. They include education, family, background, type of employment, various aspects, age. Those are all factors that I've included. I can't say one factor weighs over another one. There's a lot of times, Your Honor, that it's just a reaction to the situation.

THE COURT: Who are the blacks we have remaining on the jury?

MR. HAYWARD: Vernice Atkins and Annie Williams.

THE COURT: Annie Ivory.

MR. MATTHEWS: She is two--

MR. RUBIN: Haven't gotten to her. Have we? I don't think we got to her.

MR. HAYWARD: Yes, we did. I left her on here. Vernice Atkins. I left Annie Williams on based upon the voir dire. There are various items in their background.

THE COURT: I'm going to go ahead with the election of alternates...

The district court made no further findings as to whether a prima facie case of discrimination had been made or whether the reasons stated by the prosecutor for striking the black venirepersons were racially neutral. The actual petit jury consisted of nine whites and three blacks. There was one white and one black alternate.

At the conclusion of all the evidence and the deliberations of the jury, Allison was found guilty of Counts One and Two of the superseding indictment. Following the denial of his Motion for a New Trial, which again raised the Batson issue, Allison was sentenced on December 15, 1988, to one hundred twenty months in prison and fined five thousand dollars on Count One of the superseding indictment, and sentenced to ten years in prison on Count Two of the superseding indictment, with the prison

sentences to run concurrently. On December 21, 1988, Allison filed his notice of appeal from the judgment of the district court and on December 23, 1988, Allison filed his amended notice of appeal from the judgment and the sentence under the Sentence Reform Act (R2-146). On August 17, 1990, a majority of the panel of the United States Court of Appeals for the Eleventh Circuit affirmed the district court decision, holding that a remand to the district court for that court's determination of whether a prima facie case under Batson had been established, was unnecessary, because as a matter of law, the evidence presented in the district court was insufficient to raise an inference of purposeful discrimination. Judge Hatchett filed a dissenting opinion. On November 8, 1990 Allison's Petition For Re-Hearing And Suggestion For Re-Hearing In

Banc was denied without opinion. Petitioner now seeks certiorari solely on the Batson issue.

REASONS FOR GRANTING THE WRIT

I. THIS COURT MUST ESTABLISH A PROCEDURAL FRAMEWORK FOR THE LOWER COURTS TO DETERMINE ISSUES ARISING AS A RESULT OF BATSON V. KENTUCKY, SO THAT MEANINGFUL APPELLATE REVIEW OF TRIAL COURTS' RULINGS CAN BE CONDUCTED.

In Batson v. Kentucky, 476 U.S. 79 (1986), this Court held that contrary to the rule of law established by its prior decision in Swain v. Alabama, 380 U.S. 202 (1965), it was no longer necessary to establish a consistent pattern of official racial discrimination in excluding blacks from a jury before a defendant could successfully challenge the composition of a jury on equal protection grounds. In Batson, the Court held:

> That a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at

the defendant's trial.

Id. at 96.

In order to establish a prima facie case of discrimination, a defendant must first show that he is a member of a cognizable racial group. Id. at 96. Secondly, he must show that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. A defendant is entitled to rely on the fact that the peremptory challenge system sets up a practice that permits such discrimination. Id. at 96; Avery v. Georgia, 345 U.S. 559, at 562 (1953). Finally he must show that these facts and any other relevant circumstances raise an inference that the prosecutor excluded venirepersons from the petit jury on account of race. Id.

Once a defendant has established a prima facie case, the burden shifts to the

prosecutor to articulate a clear, reasonably specific, racially neutral explanation for his peremptory challenges which are related to that specific case. Id. at 98 n.20.

In Batson, this Court specifically declined to formulate specific procedures to be followed by the lower courts to implement its holding.[2] In his concurring opinion, Justice White foresaw that the Court's holding in Batson would necessarily create substantial litigation in order to implement the ruling.[3] This case offers the Court the opportunity to resolve some of the procedural problems which have plagued the lower courts since Batson as the procedures utilized by both the district court and the Court of Appeals were

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[2] Id. at 99.

[3] Id. at 102.

inconsistent with the intent, if not the letter, of this Court's opinion in Batson.

Although the trial judge at least implied that she believed that a prima facie case had been made when she stated to the prosecutor that she could require him to make a statement as to why he was excluding blacks (See Stanley v. State, 313 Md. 50, 542 A.2d 1267, 1283 (citations omitted)), and then noted that case law increasingly questioned the reasons for strikes, the trial judge never made an explicit finding that a prima facie case had been established. The Court of Appeals seemingly ignored this implied finding by the district court, as its opinion gave absolutely no deference to such a finding, as is required by Batson.[4] Assuming that the Court of Appeals held that there was no

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[4] Id. at 98 n.21.

such finding by the district court, then contrary to this Court's opinion in Batson and decisions not only of its own circuit[5], but also the Second Circuit[6], the Third Circuit[7], the Fourth Circuit[8], and the Eighth Circuit[9], the Court of Appeals did not remand the case to the district court for the trial judge who participated in the voir dire to make the necessary findings of fact for appropriate appellate review. The Court of Appeals conducted its own de novo review of the record and effectively

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[5] United States v. David, 803 F.2d 1567 (11th Cir.1986)

[6] United States v. Ruiz, 894 F.2d 501 (2nd Cir.1990)

[7] Harrison v. Ryan, 909 F.2d 84 (3rd Cir.1990)

[8] United States v. Allen, 814 F.2d 977 (4th Cir. 1987), cert. denied, 488 U.S. 944 (1989)

[9] United States v. Johnson, 873 F.2d 1137 (8th Cir. 1989)

usurped the responsibility delegated to the trial judge in this Court's opinion in Batson. This Court should resolve the conflict between the opinion below and the other decisions of the various courts of appeal and establish (1) that it is the responsibility of the trial court judges to make specific findings as to whether a prima facie case has been established by a defendant and, if so, (2) whether the prosecutor's stated rationale for the questioned peremptory challenges are sufficiently racially neutral as to satisfy the standard set forth in this Court's opinion in Batson. The appellate courts could then review any such findings with the deference called for in this Court's opinion in Batson.

II. THE LOWER COURTS CANNOT BE ALLOWED TO SET SUCH A HIGH STANDARD FOR THE ESTABLISHMENT OF A PRIMA FACIE CASE AS TO RENDER THE CONSTITUTIONAL RIGHT SET OUT IN BATSON WITHOUT AN ATTAINABLE REMEDY.

In Batson, this Court held that in determining whether a defendant had established a prima facie case, the trial court should consider all relevant circumstances in determining whether or not an inference of purposeful discrimination had been established. The sole examples which this Court gave to the lower courts as to the type of relevant circumstances to be considered were 1) a "pattern" of strikes against black jurors in the venire; and 2) the prosecutor's questions and statements during voir dire and in exercising his challenges. The lower courts have differed as to the quantum of evidence necessary to raise the inference. Compare Stanley v. State, 313 Md. 50, 542 A.2d 1267 (1988) (preponderance of the evidence) with United States v. Grandison, 885 F.2d 143, 149 (4th Cir.1989), cert.

denied, 110 S.Ct. 2178 (1990) (J. Murnaghan dissenting) (compilation of facts capable of raising a suspicion sufficient enough to trigger the relatively painless remedial measure prescribed by Batson.) However, Petitioner believes that there is no decision by any court of appeal, other than United States v. Dennis, 804 F.2d 1208 (11th Cir.1986), cert. denied, 481 U.S. 1037 (1987), which is consistent with the ruling below, that even without the trial court so finding, the defendant had, as a matter of law, failed to establish a prima facie case.

It is submitted that the majority opinion below unduly focused on the number of blacks remaining on the jury and did not give sufficient consideration to the other relevant facts and circumstances which raised at least an inference that the prosecutor excluded one or more of the

challenged blacks on account of race. First, there was a "pattern" of strikes against black venirepersons in that the prosecutor used sixty percent (60%) of his peremptory challenges (3 out of 5) to strike blacks from a venire, in which, after strikes for cause, blacks constituted less than twenty percent. This "pattern" is even more probative when the Court considers the fact that one of the two whites peremptorily challenged by the prosecutor was the wife of the Chief Assistant Public Defender in Orlando, who had been with the Public Defender's Office for fifteen years and who would therefore virtually always be a prime target for a peremptory challenge by a prosecutor. This "pattern" of striking black jurors was similar to "patterns" in cases in which other circuits have found prima facie cases. See United States v. Johnson, 873

F.2d 1137 (8th Cir.1989) (two of six peremptories used to strike blacks, two blacks on petit jury). United States v. Ruiz, 894 F.2d 501 (2nd Cir.1990) (three of six peremptories used to strike Hispanics, one Hispanic on petit jury).

Second, a review of the voir dire process revealed virtually nothing to differentiate jurors Gloria Martin, Laura Farrington and Terry Patrick, the blacks who were peremptorily challenged by the prosecutor from not only the other jurors in the venire but also the white jurors who actually sat on the jury. Ms. Martin lived in Daytona Beach, had a high school education, was retired, married, and had six children. Other than this basic information, similar to information related by each of the jurors individually, Ms. Martin's only response to the specific questions asked by the trial court, related

to the fact that her nephew had been convicted of a robbery ten years before and had spent approximately three years in jail. Ms. Martin further advised that she was not close to either her nephew or her sister and did not know anything about the circumstances of the crime. Of the twelve venirepersons who sat on the jury, at least two others had high school educations (both white), three were retired (all white), nine were married and eight had children. There was therefore virtually nothing to distinguish this black venireperson from other venirepersons who sat on the jury.

Laura Farrington, another black venireperson challenged by the prosecutor, lived in Orlando, had a high school education and was married with six children. She had worked inside the home and her husband was retired from the Navy Training Center. She did not respond to

any of the specific inquiries addressed to the jurors by the trial court. In addition to her similarities to other members of the jury as a result of her marital status, children, and educational level, there was a juror chosen who was also a housewife (white) and three jurors who were retired (all white). Again, there was seemingly nothing to differentiate Ms. Farrington from other white members of the venire who were chosen to serve on the jury.

The final black person challenged by the prosecutor was Terry Patrick. Other than being married, having a child and being black, Mr. Patrick seemingly had little in common with venirepersons Martin and Farrington. He was a college graduate with an associate's degree in applied science, was an electronic technician at Cape Canaveral and was married to an electronic technician. At least four of the actual

jurors were college graduates (three white). Mr. Patrick's sole other response to the trial court's inquiries was that his father's car had been stolen in 1985 but no one was ever charged. As was the case with the other two venirepersons peremptorily challenged by the prosecutor, there was virtually nothing to distinguish Mr. Patrick from the jurors empaneled to hear this case. The prosecutor did not request any follow up questions to any of these three venirepersons.

The prosecutor's statements during the voir dire process further supported an inference of racial consideration in the exercise of the prosecutor's peremptory challenges. While acknowledging a familiarity with the various factors which the courts consider in cases involving Batson issues, the prosecutor offered no specific reasons for his peremptory

challenge to any of the blacks whom he had stricken. To the contrary, he defended his strikes by stating that he didn't "think there's any systematic exclusion of blacks," denying a racial motivation for the strikes and then instead of explaining why he had challenged the three blacks who were struck, he simply explained why he had left other blacks on the jury. This response by a prosecutor who was obviously knowledgeable of Batson and its progeny's requirement for a prosecutor to state specific racially neutral reasons for excluding black venirepersons, at a time when any such racially neutral reasons would have been fresh in his mind, was further evidence to support an inference of racial consideration in the exercise of his peremptory challenges. See United States v. Clemmons, 892 F.2d 1153, 1156 (3rd Cir.1989), cert. denied, 110 S.Ct. 2623

(1990); United States v. Lewis, 837 F.2d 415, 417 (4th Cir.1988), cert. denied, 488 U.S. 923 (1988).

In order to make out a prima facie case of a Batson violation, the evidence need only support an inference of racial consideration in the exercise of peremptory challenges. Batson at 96. As stated by this Court in Batson, the system of "peremptory challenges constitutes a jury selection practice that permits those to discriminate who are a mind to discriminate." Id. at 96. No prosecutor familiar with Batson and its progeny who was of a mind to so discriminate would ever now exercise his peremptory challenges in such a blatantly discriminatory manner as to strike all of the blacks in the venire, as he would be undermining his own racially motivated purposes in so doing. To hold as a matter of law that the evidence in this

case could not support an inference of a Batson violation because of the inclusion of blacks on the jury, when the prosecutor could have peremptorily challenged all of the blacks would "place[] on defendants a crippling burden of proof" which would once again render prosecutors' peremptory challenges "largely immune from constitutional scrutiny." Batson at 92-93; United States v. Horsley, 864 F.2d 1543, 1545 (11th Cir. 1989).

III. WHETHER THE REASONS ADVANCED BY THE PROSECUTOR FOR USING THREE PEREMPTORY CHALLENGES TO STRIKE BLACK VENIREPERSONS WERE INSUFFICIENT TO SATISFY HIS BURDEN TO ARTICULATE A CLEAR, REASONABLY SPECIFIC AND RACIALLY NEUTRAL EXPLANATION FOR STRIKING THE BLACK JURORS WHO WERE CHALLENGED BY THE PROSECUTOR.

Under Batson, if an inference of discrimination in the jury selection process is established, the burden shifts to the prosecutor to articulate the racially neutral reasons for his

challenges. A prosecutor cannot meet this burden by simply stating that he had no discriminatory motive in exercising these challenges and affirming his good faith. Batson at 97-98. In order to meet his burden, the prosecutor must articulate a racially neutral explanation which is related to the particular case to be tried and which is clear and reasonably specific. Batson at 98-99 n.20; United States v. Horsley, 864 F.2d 1543, 1546 (11th Cir.1989). The self serving and indefinite reasons which the prosecutor advanced in the district court cannot meet the standard set by this Court in Batson.

Initially, the prosecutor proffered "Well, I originally struck two blacks because I wanted other individuals that were behind them. I preferred them more on the jury." No reason was given why the prosecutor preferred other individuals who

were behind the two black venirepersons. Next the prosecutor stated "The Government did not strike two other people who were black. I don't think there's any systematic exclusion of blacks." Giving any weight to this explanation would conflict with decisions of the Eleventh Circuit and the Eighth Circuit that the striking of a single black juror for racial reasons violates the Equal Protection Clause, even when other black jurors sit on the petit jury and there are valid reasons for the striking of some black venirepersons. See United States v. David, 803 F.2d 1567, 1571 (11th Cir.1986); United States v. Johnson, supra, at 1139-40.

Next in response to an inquiry from the trial court, the prosecutor denied any racial motivation for his strikes. Notwithstanding this Court's admonition in Batson that such an explanation would be

insufficient, the district court seemingly felt that such an explanation was sufficient to meet the prosecutor's burden when it stated "I will allow the case to proceed on that basis." Only after the defense objected to the insufficiency of the rationale advanced by the prosecutor did the court request that the prosecutor advance additional reasons for his strikes. At that time, the prosecutor concluded his reasons for his strikes of black venirepersons by stating "[t]here are various reasons, Your Honor. I can only allude to various factors which the courts go over. They include education, family, background, type of employment, various aspects, age. Those are all factors that I've included. I can't say one factor weighs over another one. There's a lot of times, Your Honor, that it's just a reaction to the situation." Instead of

articulating a neutral explanation related to the particular case to be tried as is required by Batson, the prosecutor merely referenced various racially neutral factors which the lower courts have considered since Batson. He refused, however, to indicate how those factors entered into his decision to strike the three black venirepersons whom he had peremptorily challenged. His explanation that he could not say how any of these factors weighed against the others and that at times a decision to peremptorily challenge was just a "reaction to the situation" is virtually analogous to the response by the prosecutor which the Eleventh Circuit itself found insufficient in United States v. Horsley, supra.[10]

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[10] "I don't have any particular reason. I just got a feeling about him as I have about Mr. Gonzalez and several others." Id. at 1544.

The explanations fall well short of the clear and reasonably specific explanation of legitimate reasons for exercising the challenges, which this Court required in Batson. "If such general assertions were accepted as rebutting a defendant's prima facie case, the equal protection clause would be but a vain and illusory requirement." Id. at 98. (quoting Norris v. Alabama, 294 U.S. 587, 588 (1935)).

Assuming arguendo that the district court and majority opinion below found that the prosecutor's explanation was sufficiently racially neutral to satisfy Batson, such findings were clearly erroneous.

CONCLUSION

For the reasons stated herein, the petition for certiorari should be granted.

Respectfully submitted,

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A P P E N D I X

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA
Orlando Division

UNITED STATES OF AMERICA
V.
STEVEN ALLISON

JUDGMENT INCLUDING
SENTENCE UNDER THE
SENTENCING REFORM ACT

Case Number 88-59 Cr-Orl-19

Thomas M. Matthews, Esq.
(Appointed)
Defendant's Attorney

THE DEFENDANT:

was found guilty on counts(s) One and Two of the Superseding Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count No.
21 USC 846	Conspiracy to possess with intent to distribute a controlled substance (cocaine hydrochloride).	One
21 USC 846 and 18 USC 2	Aiding and abetting	Two

and attempting to
possess with intent
to distribute a
controlled substance
(cocaine hydrochloride).

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

217-08-2129

December 15th, 1988
Date of Imposition
of Sentence

Defendant's mailing address:
1405 Iron Forge Road
Forestville, Maryland 20747

/s/ Patricia C. Fawsett
Signature of Judicial Officer

PATRICIA C. FAWSETT,
U.S. District Judge

Defendant's residence address:

Seminole County Jail
211 Bush Blvd.
Sanford, FL 32771

December 21, 1988
Date

Defendant: STEVEN ALLISON
Case Number: 88-59 Cr-Orl-19

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED TWENTY (120 MONTHS) (Ten Years) on Count One of the superseding Indictment.

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED TWENTY (120) MONTHS (Ten Years) on Count Two of the superseding Indictment.

The terms of Imprisonment and supervised release imposed with respect to Count Two of the superseding Indictment shall run concurrently with the terms of imprisonment and supervised release imposed with respect to Count One of the superseding Indictment.

The defendant is remanded to the custody of the United States Marshal.

Defendant: STEVEN ALLISON
Case Number: 88-59 Cr-Orl-19

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS on Count One of the superseding Indictment.

Upon release from imprisonment the defendant shall be on supervised release for a term of FIVE (5) YEARS on Count Two of the superseding Indictment.

The terms of imprisonment and supervised release imposed with respect to Count Two of the superseding Indictment shall run concurrently with the terms of imprisonment and supervised release imposed with respect to Count One of the superseding Indictment.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

As special conditions of the supervised release imposed herein, the defendant shall submit to such alcohol and drug testing as may be directed by the supervising

probation officer.

Defendant: STEVEN ALLISON
Case Number: 88-59 Cr-Orl-19

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $5,100.00, consisting of a fine of $5,000.00 and a special assessment of $100.00.

These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

A fine of FIVE THOUSAND DOLLARS ($5,000.00) is imposed with respect to Count One of the superseding Indictment, and shall be paid in accordance with a payment plan arranged by the supervising probation officer.

A special assessment of FIFTY DOLLARS ($50.00) is imposed on each of Counts One and Two of the superseding Indictment, for a total assessment of ONE HUNDRED DOLLARS ($100.00) which shall be paid immediately.

/s/ Patricia C. Fawsett
Signature of Judicial Officer

PATRICIA C. FAWSETT,
U.S. District Judge

UNITED STATES of America,
Plaintiff-Appellee,

v.

Steven ALLISON, Anthinino Galloway,
Defendants-Appellants.

No. 88-4040.

United States Court of Appeals,

Eleventh Circuit.

August 17, 1990.

Defendants were convicted in the United States District Court for the Middle District of Florida, No. 88-59-Cr-Orl-19, Patricia C. Fawsett, J., of conspiracy to possess with intent to distribute cocaine and aiding and abetting each other in attempt to possess cocaine. Defendants appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) out-of-court statements were admissible as coconspirator testimony; (2) evidence was sufficient to sustain conviction; and (3) prosecutor's use of peremptory strikes to remove blacks

from jury did not violate Batson.

Affirmed.

Hatchett, Circuit Judge, filed a dissenting opinion.

Ellis S. Rubin, Atty. Gen., A. Hinda Klein, Rubin, Rubin & Fuqua, P.A., Miami, Fla., Stanley P. Klein, State's Atty., Klein & Greenspun, Fairfax, Va., for defendants-appellants.

Ronald Hayward, Asst. U.S. Atty., Orlando, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before HATCHETT and EDMONDSON, Circuit Judges, and BRIGHT*, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

Defendants Allison and Galloway appeal their conviction for conspiracy to possess with intent to distribute cocaine and for aiding and abetting each other in the

attempt to possess cocaine. Allison and Galloway, along with Donald Ervin and Michael Campbell, decided to purchase cocaine in Miami and to transport it to Washington, D.C. One of Allison's friends, Laboya Wicker, agreed to contact her sources in Miami to get the drugs. The conspirators flew to Miami for the deal. After learning that Wicker might be a Drug Enforcement Administration ("DEA") agent, the conspirators arranged to get the cocaine in Orlando from sources known to another of Allison's friends, Walter Johnson. Johnson's source in Orlando turned out to be a DEA agent.

After their arrests, Campbell and Johnson pleaded guilty to conspiracy and agreed to testify against the others. Ervin was never apprehended. Allison and Galloway were tried jointly and convicted. On appeal, Galloway claims that he was

convicted on the basis of inadmissible co-conspirator hearsay testimony and that, even if the testimony was admissible, the evidence presented was insufficient to sustain his conviction. Allison challenges his conviction for insufficiency of the evidence and for discriminatory use of peremptory challenges to strike black jurors in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Galloway raises no Batson claim.

1. Co-conspirator Testimony

At trial, Galloway made a continuing objection to the admission of several out-of-court statements attributed to Donald Ervin and Allison and made during the course of the events leading to defendants' arrest.[1] The prosecutor proffered these

[1]On appeal, Galloway has failed to identify which of the other co-conspirators' statements he complains

statements under Federal Rule of Evidence 801(d)(2)(E), which provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay and can thus be offered for the truth of the matter asserted.

[1] When determining whether a co-conspirator's statement is admissible over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied that there was a conspiracy involving the declarant and the defendant

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about. He has never specified the hearsay statements to which he objects, why each statement was inadmissible, and how in each instance he was harmed by the evidence. "We are therefore limited to searching the record for plain error and we find none." United States v. Plotke, 725 F.2d 1303, 1309 (11th Cir.1984); United States v. Piatt, 679 F.2d 1228, 1232 (8th Cir.1982) (rejecting challenge to admission of co-conspirator hearsay for failure to identify objectionable statements with specificity on appeal).

against whom the statement is offered, and that the statement was made during the course of and in furtherance of the conspiracy. Bourjaily v. United States, 483 U.S. 171, 175, 107 S.Ct. 2775, 2778, 97 L.Ed.2d 144 (1987). Galloway concedes the existence of a conspiracy between Ervin, Campbell, and Allison to purchase cocaine. He also concedes that the challenged statements were made by members of the conspiracy during the course of and in furtherance of the conspiracy. Galloway's sole challenge is his claim that he was not a member of the conspiracy. Thus, he argues, out-of-court statements about the scope of the conspiracy were inadmissible and highly prejudicial.

[2,3] Whether Galloway was a participant in the conspiracy is a preliminary question of fact that, under Federal Rule of Evidence 104(a), "shall be

determined by the court." The evidentiary standard--unrelated to the substantive issues--is preponderance of the evidence. Bourjaily, 483 U.S. at 175, 107 S.Ct. at 2779. "There is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of the defendant and the declarant in the conspiracy." Id. at 180, 107 S.Ct. at 2781. Thus, under Bourjaily, the court can look at the substance of the challenged co-conspirator testimony, as well as independent evidence, to determine whether or not Galloway was a participant in the conspiracy.

[4-6] At the close of the government's case, the district court held a James hearing and determined that

Galloway was involved in the conspiracy.[2] A James determination will not be reversed unless clearly erroneous. United States v. Perez, 824 F.2d 1567, 1570 (11th Cir.1987). The record shows that (1) Galloway was present at the initial meeting of the co-conspirators, at the Classic's Nightclub, in which they discussed the drug deal; (2) Galloway gave Allison money to finance

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[2]In this Circuit, the hearing at which the admissibility of co-conspirator hearsay is determined is called a James hearing, after United States v. James, 590 F.2d 575 (5th Cir.1979). Galloway claims he was entitled to a James hearing prior to admission of the offending statement. This is not true. "[I]f the district court concludes that a James hearing is not reasonably practical, it can admit the statements subject to the government later connecting them up" with sufficient evidence. United States v. Barshov, 733 F.2d 842, 850 (11th Cir.1984); James, 590 F.2d at 582. The government made its offer of proof; the court made a preliminary determination to allow the statements in based on this offer, subject to the government's ability to prove Galloway's participation in the conspiracy. We find no error in the procedure adopted by the court.

airfare to Miami for Allison, Wicker and Campbell; (3) Galloway flew to Miami with Ervin and shared a hotel room with Ervin while the details of the drug purchase were negotiated; (4) Campbell was arrested in possession of a note with Galloway's name and hotel number; (5) Campbell cleared arrangements for the Orlando purchase through Galloway and Ervin; (6) Galloway arranged for Mark Thompson to serve as a courier to drive him and the drugs to Washington, D.C.; (7) when the deal in Miami soured, Galloway arranged for his courier to drive Ervin and himself to Orlando where they would complete the drug purchase; and (8) Galloway, present when Johnson picked up the money, reputedly told Johnson that, "We have $60,000 for the deal. It's in the drawer." We see no error in the court's findings. The co-conspirator testimony was properly

admitted.

[7,8] Several of the statements Galloway challenges are actually statements made by him to witnesses who testified about these statements at trial. These statements were allowable as party admissions under Federal Rule of Evidence 801(d)(2)(A). "Any and all statements of an accused, so far as they are not excluded by the doctrine of confessions or by the privilege against self-incrimination, are usable against the accused and are not hearsay." United States v. Clemons, 676 F.2d 122, 123 (5th Cir.Unit B 1982)[3]. Admissibility of such statements depends on neither membership in a conspiracy, nor proof of an ongoing conspiracy. Piatt, 679

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[3]In Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir.1982), the Eleventh Circuit Court of Appeals adopted as precedent all decisions of Unit B of the former Fifth Circuit.

F.2d at 1233; see also United States v. Archibold-Newball, 554 F.2d 665, 676 (5th Cir.1977)[4] (defendant's incriminating admissions, as related at trial by co-conspirators, were not hearsay).

2. Sufficiency of Evidence

[9] In reviewing a conviction for sufficiency of the evidence "[t]his court must view the evidence in the light most favorable to the government,...and determine whether the jury could have found defendant guilty beyond a reasonable doubt." United States v. Poole, 878 F.2d 1389, 1391 (11th Cir.1989) (per curiam). "The evidence need not be inconsistent with every reasonable hypothesis except guilt,

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[4]In Bonner v. City of Prichard, 661 F. 2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

and the jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial." Poole, 878 F.2d at 1391. "'In applying this standard all reasonable inferences and credibility choices must be made in favor of the jury verdict, and that verdict must be sustained if there is substantial evidence to support it when the facts are viewed in the light most favorable to the government.'" United States v. Pintado, 715 F.2d 1501, 1503 (11th Cir.1983) (per curiam) (quoting United States v. Davis, 666 F.2d 195, 201 (5th Cir. Unit B 1982)). The court is not restricted to the evidence adduced during the government's case-in-chief. The court may examine all the evidence presented at trial.

[10] The jury in this case had the opportunity to consider not only the

evidence presented in the prosecution's case, but the testimony of defendants themselves. This is important. "Presented with two narratives, one tending to establish the defendants' guilt and another tending to establish innocence, the jury was entitled to choose the account offered by the government." United States v. Goggin, 853 F.2d 843, 846 (11th Cir.1988). "'[W]hen a defendant takes the stand in a criminal case...the jury is free to disbelieve him and reject his explanation as a complete fabrication.'" Goggin, 853 F.2d at 846 (quoting United States v. Cotton, 770 F.2d 940, 945 (11th Cir.1985)). The jury may view defendant's false explanatory statement as substantive evidence proving guilt. See United States v. Howard, 895 F.2d 722, 724 (11th Cir. 1990); United States v. Bennett, 848 F.2d 1134, 1139 (11th Cir.1988); United States

v. Elledge, 723 F.2d 864 (11th Cir.1984).

[11] Both Galloway and Allison were convicted of aiding and abetting the attempted purchase of cocaine and of conspiracy to possess cocaine. To convict a defendant of conspiracy, the government must prove (1) that an agreement existed, (2) that defendants knew of its general purpose, and (3) that defendants voluntarily participated in the conspiracy. Howard, 895 F.2d at 724.

a. Galloway

[12] Galloway does not dispute the existence of an agreement to purchase drugs or his knowledge of the general purpose of that agreement. He argues that he did not participate in the conspiracy. The evidence is adequate, however, to show that Galloway played a central role in aiding and abetting the transaction. As set out in part 1 above, the facts show that

throughout the conspiracy, Galloway acted knowingly and voluntarily. Galloway testified that he knew from the outset that Ervin was going to Miami to purchase drugs. Based on Galloway's testimony and other evidence, the jury could easily infer that Galloway had full knowledge of the conspiracy and could conclude that Galloway actively participated in the conspiracy.

Galloway elected to present an active defense, as is his right. Galloway claimed that he went to Miami to purchase an antique car and that Ervin asked to accompany him. Galloway admitted giving Allison money for the Miami airfare, but he claims that Ervin asked him to advance the money and then reimbursed him. Galloway said that he acted out of "friendship" and to save money when he shared a Miami hotel room with Ervin, drove Ervin to Orlando where the drug deal occurred, and waited in

the hotel with Allison and Ervin for the co-conspirators to return with the drugs.

Galloway's testimony supports two hypotheses: (1) that Galloway was a central player in the drug conspiracy or (2) that he was "merely present". The jury, which was charged with making credibility determinations, convicted Galloway. Even on the paper record, Galloway's story is riddled with inconsistencies and makes little sense. The jury was entitled to believe the first hypothesis. There was sufficient evidence to convict Galloway.

b. Allison

[13] Allison claims he was convicted of the wrong drug conspiracy. Allison admits that he solicited Wicker as a cocaine source, that he flew to Miami with his colleagues to purchase cocaine, and that he participated in the conspiracy to purchase

cocaine in Miami. But, he claims that when the drug purchase was set in Orlando, a new and separate conspiracy arose--a conspiracy involving new players and new objectives, and in which he played no part. The government maintains that there was one over-arching conspiracy, begun in Washington, D.C. and completed in Orlando, whose objective was to purchase $60,000 worth of cocaine.

[14] The question of single versus multiple conspiracies is one for the jury. See United States v. Champion, 813 F.2d 1154, 1165 (11th Cir.1987). In determining whether a reasonable trier of fact could have found a single conspiracy, the courts of this circuit have looked at three factors: "(1) whether a common goal existed, (2) the nature of the scheme, and (3) overlap of the participants." Champion, 813 F.2d at 1166 (quoting United

States v. Caporale, 806 F.2d 1487, 1499-1500 (11th Cir.1986)). The jury was specifically instructed on multiple versus single conspiracies. After a review of the record, we conclude that it was possible for the jury to find one over-arching conspiracy.

Allison was in Miami to conclude a drug purchase. When Allison learned that his Miami cocaine source might be a DEA agent, Allison informed his co-conspirators of the need to find another source. Allison vouched for Johnson to the co-conspirators who did not previously know Johnson. In fact, Johnson had been tipped off by Allison's girlfriend that Allison was in Miami trying to pick up some cocaine and saw an opportunity to combine resources for a joint purchase.

Thus, all the Champion elements were satisfied. There was no break in time

between the alleged conspiracies. There was a continuous course of conduct ending in Orlando when defendants attempted to purchase cocaine. From the evidence, a reasonable person could find that there was one conspiracy from which Allison never withdrew.

3. Use of Peremptory Challenges

[15] Allison also challenges his conviction on the ground that the prosecutor's use of peremptory strikes to remove blacks from the jury violated Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). From a forty-person venire that included six blacks, the government used three out of a potential six peremptory challenges to strike black jurors. Three blacks were ultimately chosen for the jury--two jurors and one alternate. Both Allison and Galloway are black.

Allison argues (1) that Batson requires the trial court to find whether the defendant has established a prima facie case of discrimination in the selection of the jury and, if so, whether the prosecutor has given sufficient racially neutral reasons for his peremptory challenges; (2) that the second strike of a black man was sufficient to establish a prima facie case; (3) that the district court implicitly found that a prima facie case existed when the court asked the prosecutor to explain his strikes; and (4) that the explanations offered by the prosecutor were insufficient.

[16,17] A defendant begins to build a prima facie case under Batson if he can "show that he is a member of a cognizable racial group... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's

race." Batson, 476 U.S. at 96, 106 S.Ct. at 1723; United States v. David, 844 F.2d 767, 769 n. 2 (11th Cir.1988). A defendant "must [also] show that these facts and any other relevant circumstances raise an inference that the prosecutor used [the challenges] to exclude the veniremen from the petit jury on account of their race." Batson, 476 U.S. at 96, 106 S.Ct. at 1723 (emphasis added). Once a prima facie case has been established, "the burden shifts to the prosecutor to articulate a clear, reasonably specific and neutral explanation for challenging the black jurors." David, 844 F.2d at 769. The explanation, however, "need not rise to the level justifying the exercise of a challenge for cause." Batson, 476 U.S. at 97, 106 S.Ct. at 1723.

The district court never expressly determined whether Allison had made a prima facie case of a Batson violation. After

two black jurors were struck (and two white jurors struck), the judge told the prosecutor: "I can require that you make a statement...at this time as to why you are striking blacks." Although a third black juror was struck, the prosecutor may not have known the juror was black. At the close of jury selection, but before selection of alternates, the court asked the prosecutor to explain why he struck the blacks. The prosecutor denied that the strikes were racially motivated and said this:

Well, I originally struck two blacks because I wanted other individuals that were behind them. I preferred them more on the jury. The government did not strike two other people who were black. I don't think there's any systematic exclusion of blacks.

When pressed for more detail, the

prosecutor added this:

> There are various reasons, your honor. I can only allude to various factors which the courts go over. They include education, family, background, type of employment, various aspects, age. Those are all factors that I've included. I can't say one factor weighs over another one. There's a lot of times, your honor, that it's just a reaction to the situation.

The district Court denied the Batson claim and allowed selection of alternates to proceed. The impaneled jury ultimately included three blacks--two regular jurors and one alternate juror. From the record it is impossible to know the basis of the district court's denial of the Batson

objection.[5] The trial court might have believed that Allison failed to establish prima facie case or that the prosecutor presented adequate nondiscriminatory reasons for the discharge.

The Supreme Court in Batson contemplated that the determination of whether a prima facie case under Batson is established will ordinarily, if not always, be made in the first instance by the trial court. A remand to the trial court to make such a determination in this case, however, is unnecessary, because we hold as a matter of law that Allison failed to present evidence sufficient to raise an inference of purposeful discrimination. See United States v. Dennis, 804 F.2d 1208, 1210 n. 22 (11th Cir.1986).

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[5]In a post-trial motion for new trial, Allison again raised a Batson claim. The court denied the motion without opinion.

In Dennis, the government used three of its six peremptory challenges in selecting the jury; two of the potential jurors stricken from the venire were black. The government also challenged the selection of a potential alternate juror who was black. The final jury included two black and one black alternate. We concluded from these facts:

> It is thus obvious that the government did not attempt to exclude all blacks, or as many blacks as it could from the jury. Moreover, the unchallenged presence of two blacks on the jury undercuts any inference of impermissible discrimination that might be argued to arise from the fact that the prosecutor used three of the four peremptory challenges he exercised to strike blacks from the panel of potential jurors and

> alternates... We thus conclude that all of the relevant facts and circumstances do not raise an inference of purposeful discrimination on the basis of race, and that appellants were not entitled to any inquiry into the prosecutor's reasons for exercising his peremptory challenges as he did.

Dennis, 804 F.2d at 1211. As in Dennis, the unchallenged presence of three blacks on the jury undercuts any inference of impermissible discrimination that might arise simply by the striking of other blacks.[6] We recognize that the seating of

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[6]Cf. United States v. Horsley, 864 F.2d 1543 (11th Cir.1989) (holding that Batson does not require pattern of peremptory strikes against minimum of three or four black veniremen; strike of only black member of venire might make out prima facie case); United States v. David, 844 F.2d 767 (11th Cir. 1988) (recognizing appellant's failure to make out prima facie case--where one black juror and one black alternate were chosen for final jury--as alternate

some blacks on the jury does not necessarily bar a finding of racial discrimination, but it is a significant fact.

[18] While it is true that striking a black venireperson for racial reasons violates the Constitution, it is not true that all peremptory strikes of black venirepersons are for racial reasons. In making out a prima facie case, "the defendant must point to more than the bare fact of the removal of certain venirepersons and the absence of an obvious valid reason for the removal." United States v. Young-Bey, 893 F.2d 178, 179 (8th Cir.1990). See also United States v. Dawn, 897 F.2d 1444(8th Cir.1990) ("numbers alone are not sufficient to establish or negate

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basis for district court's opinion, but affirming on basis trial court could properly say government had rebutted prima facie case).

a prima facie case"); United States v. Moore, 895 F.2d 484, 485-86 (8th Cir.1990) (same); United States v. Lewis, 892 F.2d 735, 736 (8th Cir.1989) (same). "[T]he defendant must identify facts and circumstances that support the inference of discrimination, such as a pattern of discriminatory strikes, the prosecutor's statements during voir dire suggesting discriminatory purpose, or the fact that white persons were chosen for the petit jury who seemed to have the same qualities as stricken black venirepersons." Young-Bey, 893 F.2d at 180 (citing Batson, 476 U.S. at 96-97, 106 S.Ct. at 1722-23); accord Dennis, 804 F.2d at 1210.

Allison has pointed to nothing that strongly suggests racial motivation was the basis for the strikes used.[7] Fifteen

[7]At trial, Allison did not argue (and has not said he was barred from arguing to the district court) that specific white

percent of the venire for this case were black.[8] The percentage of blacks on the jury (including alternates) was twenty-one percent. The prosecutor struck three black jurors; he also struck two white jurors. The prosecutor preserved three black jurors, even though he had enough peremptory challenges to strike all the black jurors. Under such circumstances, we reject Allison's Batson claim.[9]

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jurors who were accepted for the jury had basically the same backgrounds, educations, and other acquired attributes as one or more of the three black jurors who were struck from the jury; and, even on appeal, Allison does not make a specific comparison of similarities between black persons that were rejected and white persons accepted for the jury.

[8]If we define the juror pool to be the impaneled jury (including alternates) plus the jurors who were peremptorily struck, the percent of blacks in the pool was twenty-one percent.

[9]Judge Bright would add that the prosecutor gave an explanation which the trial judge impliedly deemed satisfactory and that the whole record, including the prosecutor's explanation, indicates the

AFFIRMED.

HATCHETT, Circuit Judge, dissenting:

I dissent. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), holds that a prosecutor's use of a peremptory challenge to remove even one African-American juror from a jury due to racial considerations is unconstitutional. "[T]he command of Batson is to eliminate, not merely to minimize racial discrimination in jury selection." United States v. David, 803 F.2d 1567, 1571 (11th Cir.1986). When a prosecutor's strike of an African-American juror is objected to and the district court finds a prima facie case of discrimination, the district court is required to make inquiry of the prosecutor to determine whether the strike is based upon racial or racially neutral

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absence of racial animus.

grounds. In this case, the defendant objected to the strikes, and the district court properly required an explanation. The district court improperly failed to rule on whether Allison established a prima facie case and improperly found that the prosecutor's stated reasons were sufficient. The majority misapplies the law as pronounced by the Supreme Court and this circuit. Allison satisfied the Batson test for a prima facie case of discrimination. In addition, the prosecutor's articulated reasons, quoted in the majority opinion, are the kind of nebulous explanations which Batson rejects.

Allison demonstrated that he satisfied the first prong of his Batson claim by showing "that he is a member of a cognizable racial group...and that the prosecutor...exercised peremptory challenges to remove from the venire

members of [Allison's] race." Batson, 476 U.S. at 96, 106 S.Ct. at 1723 (citations omitted). Under the second prong of Batson, Allison was "entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Batson, 476 U.S. at 96, 106 S.Ct. at 1723 (quoting Avery v. Georgia, 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1244 (1953)). Allison is permitted to rely on this second prong to meet the third prong of the Batson test, which requires demonstration of an inference that the prosecutor used the peremptory challenges in a discriminatory manner."[T]he defendant must show that these facts [demonstrated under the first and second prongs] and any other relevant circumstances raise an inference that the

prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." Batson, 476 U.S. at 96, 106 S.Ct. at 1723. In essence, the second prong collapses into the third as a means of demonstrating the inference of discrimination.

The majority holds that Allison failed to establish a prima facie case, in part, because he did not point to "other relevant circumstances" which would support the inference of a discriminatory motivation for the strikes. In fact, Allison alleged that several of the white jurors had the same backgrounds, education, and other attributes as the three challenged African-American venire persons. See United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir.1990) (circumstance supporting the inference of discrimination includes the fact that "white persons were chosen for

the petit jury who seemed to have the same qualities as stricken black venirepersons."). Allison also alleged that discriminatory intent may be inferred from (1) the percentage of prosecutorial peremptory challenges used to strike African-American members of the venire, (2) the pattern of striking African-American venire members absent articulable and particular reasons, and (3) the prosecutor's general assertion that the strikes were not racially motivated. I would hold that Allison established the inference of discrimination required under the third prong of Batson.

The majority supports its conclusion by discussing the number of African-American jurors seated, the percentage of African-Americans on the panel, the number of white jurors struck, and the number of unused peremptory challenges. Although these

factors have some relevance, they are not controlling factors under our law.

The majority's sole case support for the outcome in this case is United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986). In Dennis, the court held that the appellant failed to make out a prima facie case of purposeful discrimination because of similar circumstances, including the presence of two African-Americans on the jury and the government's failure to use all of its peremptory challenges. The weight of case law in the Supreme Court and in this circuit runs contrary to such a conclusion, as demonstrated by the cases cited in the majority's opinion. "[U]nder Batson, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black

jurors are shown." United States v. David, 803 F.2d at 1571. It should be noted that the court in Dennis did not cite any precedent for its conclusion that the presence of African-Americans on the jury undercut any inference of discrimination. Thus, to the extent that Dennis supports affirmance in this case, I would suggest that Dennis should be overruled in banc.

The district court arguably found that Allison established a prima facie case because it expressly requested the prosecutor to state his reasons for challenging African-American jurors. At that point, the burden shifted to the prosecutor to "articulate a clear, reasonably specific and neutral explanation for challenging the black jurors." United States v. David, 844 F.2d 767, 769 (11th Cir.1988). The prosecutor could not rebut the prima facie case by merely denying that

he had a discriminatory motive or by asserting generally that he typically relies on neutral reasons for challenging jurors. "The prosecutor...must articulate a neutral explanation related to the particular case to be tried." Batson, 476 U.S. at 98, 106 S.Ct. at 1724. The prosecutor's general denial of discriminatory intent in this case is not specific or particularized enough to rebut Allison's prima face case. Therefore, I would reverse and remand this case for a new trial.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-4040

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEVEN ALLISON,
ANTHININO GALLOWAY,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion filed August 17, 1990, ___F.2d___)

Before HATCHETT and EDMONDSON, Circuit Judges, and BRIGHT, Senior Circuit Judge.

PER CURIAM:

(x) The Petition for Rehearing of appellant, Steven Allison, is/are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal

Suggestions(s) of Rehearing In Banc is/are DENIED.
ENTERED FOR THE COURT:

/s/ J.L. Edmondson
United States Circuit Judge

Supreme Court, U.S.
FILED
APR 10 1991
OFFICE OF THE CLERK

(2)

No. 90-1240

In the Supreme Court of the United States

OCTOBER TERM, 1990

STEVEN ALLISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner failed to establish a prima facie case of racial discrimination in the government's exercise of its peremptory challenges.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1240

STEVEN ALLISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7a-43a) is reported at 908 F.2d 1531.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1990. A petition for rehearing was denied on November 8, 1990. Pet. App. 44a-45a. The petition for a writ of certiorari was filed on February 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to possess and at-

tempted possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of imprisonment for 120 months, to be followed by five years' supervised release, and fined $5,000. The court of appeals affirmed. Pet. App. 7a-43a.

1. Petitioner and his co-defendant are black. For jury selection, a 40-person venire was assembled. The venire included six black potential jurors. The prosecutor exercised three of his six peremptory challenges against black individuals and two against white individuals; one peremptory challenge was not used. The impaneled jury included two black jurors, and one black juror served as an alternate. Pet. App. 25a, 34a-35a.

After the prosecutor had challenged two black and two white jurors, petitioner raised the issue whether the challenges to black jurors were improper under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The trial court noted that it could require the prosecutor to explain those strikes, but it did not do so at that time. Jury selection continued, and the prosecutor struck a third black juror. At the conclusion of jury selection, but before the selection of alternate jurors, the court asked the prosecutor to give his reasons for challenging the black jurors. The prosecutor disclaimed any racial motivation for the strikes, indicating that he had preferred other individuals for the jury. When the court asked the prosecutor to elaborate, the prosecutor added:

> There are various reasons, your honor. I can only allude to various factors which the courts go over. They include education, family, background, type of employment, various aspects, age. Those are all of the factors that I've in-

> cluded. I can't say one factor weighs over another one. There's a lot of times, your honor, that it's just a reaction to the situation.

Pet. App. 27a-29a.

Although petitioner challenged the adequacy of that statement of reasons, he did not point to any factors suggesting that the prosecutor's strikes were racially motivated. In particular, petitioner did not raise any claim that white jurors with essentially similar characteristics as the struck black jurors were accepted by the prosecutor, nor did petitioner contend that any comments of the prosecutor during voir dire revealed racial bias. Pet. App. 34a-35a n.7. The district court rejected petitioner's *Batson* claim. In a post-trial motion for a new trial, petitioner renewed his *Batson* claim, but the court denied the motion without opinion. *Id.* at 29a-30a & n.5.

2. A divided court of appeals affirmed. Petitioner contended that the district court had implicitly found a prima facie case of a *Batson* violation, the facts supported such a finding, and the prosecutor's explanations for his strikes of black jurors were inadequate. Pet. App. 26a. The court of appeals found that petitioner had failed to establish a prima facie case of purposeful discrimination, and it therefore rejected his *Batson* claim. *Id.* at 30a.

The court noted that because the district court had not explained its reasoning, it was not possible to tell whether the district court had found the absence of a prima facie case or had credited the prosecutor's explanations. Pet. App. 29a-30a. While recognizing that the determination whether a prima facie case under *Batson* exists is "ordinarily, if not always, [to] be made in the first instance by the trial court," the court found that a remand was not required in

this particular case because the record was clear and it did not support the existence of a prima facie case. *Id.* at 30a.

In support of that conclusion, the court stated that although not dispositive, "the unchallenged presence of three blacks on the jury undercuts any inference of impermissible discrimination that might arise simply by the striking of other blacks," particularly since the prosecutor had enough strikes to remove all of them. Pet. App. 32a, 35a. Moreover, the court explained that a defendant's burden to establish a prima facie case cannot be carried by noting that some black jurors were struck without obvious explanation; some indicia of discrimination are required. *Id.* at 33a. Petitioner, however, had "pointed to nothing that strongly suggests racial motivation was the basis for the strikes used." *Id.* at 34a. The court also observed that neither in the trial court nor on appeal had petitioner sought to compare the general characteristics of the black jurors who were excluded with the white jurors who were seated in an effort to establish discrimination between similarly situated jurors. Nor did numerical considerations support an inference of discrimination, because the percentage of blacks on the jury (including alternates) exceeded their percentage on the venire. *Id.* at 34a-35a. In light of those factors, the court rejected petitioner's *Batson* claim.[1]

Judge Hatchett dissented, arguing that petitioner had established a prima facie case and that the pros-

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[1] The majority opinion noted that one of the panel members, Judge Bright, "would add that the prosecutor gave an explanation which the trial judge impliedly deemed satisfactory and that the whole record, including the prosecutor's explanation, indicates the absence of racial animus." Pet. App. 35a-36a n.9.

ecutor's explanations were not sufficient. Pet. App. 36a-43a. Although agreeing with the majority that factors such as the presence of blacks on the jury, the use of some strikes against white jurors, the comparative percentages of blacks on the venire and the jury, and the prosecutor's failure to exhaust his strikes had "some relevance," he concluded that those factors were not "controlling" and that other considerations here favored the existence of a prima facie case. *Id.* at 40a-41a.

ARGUMENT

Petitioner contends (Pet. 10-30) that the court of appeals, in rejecting his *Batson* claim, committed three errors: it should have remanded to the trial court for that court to determine whether petitioner had established a prima facie case; it should have concluded that a prima facie case was made out on this record; and it should have found that the prosecutor's stated reasons for the challenges were inadequate.

1. In *Batson*, this Court held that in order to establish a prima facie case of purposeful discrimination in the selection of the petit jury, a criminal defendant must show the existence of "relevant circumstances [that] raise an inference that the prosecutor used [his peremptory challenges] to exclude the veniremen from the petit jury on account of their race." 475 U.S. at 96. Only when the defendant has made such a prima facie showing does "the burden shift[] to the [prosecutor] to come forward with a neutral explanation for challenging black jurors." *Id.* at 97.

In this case, the court of appeals concluded that petitioner's showing did not rise to the level necessary to establish a prima facie case of discrimina-

tion, and it was therefore unnecessary to evaluate whether the prosecutor had given adequate, race-neutral explanations for the strikes. Contrary to petitioner's contention (Pet. 13-14), the court of appeals did not violate *Batson* in evaluating the sufficiency of petitioner's prima facie case rather than ordering a remand. It is unquestionably the primary responsibility of the trial courts to implement *Batson*'s commands, and to make timely determinations on claims of discrimination when they are raised by a defendant. See *Batson*, 476 U.S. at 97; see also *Powers* v. *Ohio*, No. 89-5011 (Apr. 1, 1991), slip op. 16 ("It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice."). But the court of appeals recognized that principle here. See Pet. App. 30a ("*Batson* contemplated that the determination of whether a prima facie case * * * is established will ordinarily, if not always, be made in the first instance by the trial court."). The court simply concluded that, although the trial court should have made an express finding on the prima facie case issue, its failure to do so did not require a time-consuming and purposeless remand when the record was sufficiently developed for the court to determine the issue as a matter of law. This was not a case in which findings of historical fact had to be made before the sufficiency of petitioner's showing could be evaluated. Cf. *Amadeo* v. *Zant*, 486 U.S. 214 (1988). Accordingly, the court of appeals' pragmatic response to the question before it constituted a sound use of judicial resources.[2]

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[2] Unlike the ultimate question whether the prosecutor has engaged in intentional discrimination, which is a question of

To be sure, it would have been perfectly appropriate for the court of appeals to remand for further proceedings if it had elected to do so. See 28 U.S.C. 2106. But none of the cases cited by petitioner (Pet. 14) holds that a court of appeals invariably must remand in a *Batson* case, regardless of how pointless a remand would be.[3] And *Batson* itself contains no such inflexible mandate. See 476 U.S. at 99 ("We decline * * * to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.").

2. The court of appeals correctly held that petitioner failed to establish a prima facie case. *Batson* lays down no rigid rules in evaluating the existence of a prima facie case; rather, it directs consideration of "all relevant circumstances." 476 U.S. at 96-97.

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fact that largely turns on credibility, see *Batson*, 476 U.S. at 98 n.21, the existence of a prima facie case is better characterized as a mixed question of fact and law. Although trial courts are, in general, better situated to evaluate the prima facie case issue, particular situations—such as the present case—involve clear enough fact patterns to enable a reviewing court to determine the issue as a matter of law. Cf. *Pullman Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982).

[3] In two of the cases, the courts of appeals remanded because the trials had occurred before *Batson*, and there were no sufficient district court proceedings. See *United States* v. *David*, 803 F.2d 1567 (11th Cir. 1986); *United States* v. *Allen*, 814 F.2d 977 (4th Cir. 1987). In one of the cases, the court of appeals found a prima facie case, then remanded for the prosecutor to provide explanations. *United States* v. *Johnson*, 873 F.2d 1137 (8th Cir. 1989). And in the remaining cases, the court either remanded for a new trial upon finding a *Batson* violation, *Harrison* v. *Ryan*, 909 F.2d 84 (3d Cir. 1990), or affirmed the conviction after rejecting a *Batson* objection, *United States* v. *Ruiz*, 894 F.2d 501, 506 (2d Cir. 1990).

The Court noted, as examples of evidence that could support a prima facie case, the existence of a pattern of strikes against blacks, or comments by the prosecutor during voir dire. *Id.* at 97. Petitioner presented no satisfactory evidence of discrimination, either on the factors identified by the Court in *Batson*, or on other factors that have been identified by the courts in subsequent cases.

To begin with, the prosecutor did not engage in a pattern of strikes against blacks. The prosecutor had exercised two peremptory strikes against black jurors and two against white jurors when petitioner initially noted his *Batson* objection; after that objection, the prosecutor struck another black juror, but the record suggests that he may not have been aware of that juror's race. See Pet. App. 28a; Gov't C.A. Br. 24-25. Although the prosecutor had not exhausted his challenges, and could have used them in a discriminatory fashion if he had so desired, two black jurors were impaneled, as well as one black alternate juror. On comparable records, courts have had no difficulty rejecting an inference of purposeful discrimination on grounds of race.[4]

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[4] See, *e.g.*, *United States* v. *Dawn*, 897 F.2d 1444, 1448 (8th Cir.) (government used six of seven peremptory challenges to strike blacks; jury included two blacks), cert. denied, 111 S. Ct. 389 (1990); *United States* v. *Moore*, 895 F.2d 484, 486 (8th Cir. 1990) (government used four of six peremptory challenges to strike blacks; three blacks sat on the jury); *United States* v. *Grandison*, 885 F.2d 143 (4th Cir. 1989) (government used six of nine peremptory challenges to strike blacks; two blacks sat on the jury and three blacks served as alternates), cert. denied, 110 S. Ct. 2178 (1990); *United States* v. *Rogers*, 850 F.2d 435, 437 (8th Cir. 1988) (government used three of seven peremptory challenges to strike blacks; jury included two blacks and one black alternate).

Despite having an opportunity to do so, petitioner did not come forward with any other evidence to support his prima facie case of discrimination. Although petitioner makes a belated effort to suggest the presence of discrimination by comparing the struck black jurors to the accepted white jurors (see Pet. 19-22), in the trial court and in the court of appeals petitioner made no such showing, see Pet. App. 34a n.7. If the evidence had as much probative force as petitioner now contends, it is difficult to understand why petitioner would have remained silent about it throughout the proceedings below.

Finally, petitioner claims that the prosecutor's statements to the trial judge, made after petitioner had raised his *Batson* objection, somehow revealed a discriminatory intent. That argument is without merit. First, nothing in the prosecutor's statements remotely indicates an intent to discriminate; to the contrary, the prosecutor affirmed that his challenges rested on such neutral criteria as education, family background, employment, and age. Second, the proper focus, in determining whether a prima facie case exists, is not on what the prosecutor says after the defendant makes a *Batson* objection and the court requests an explanation; rather, because there must be a prima facie case before any explanation is required, the proper focus is on the prosecutor's conduct and his comments in the course of jury selection itself. As to that process, petitioner has offered nothing that casts doubt on the race-neutrality of the prosecutor's motives.[5]

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[5] Contrary to petitioner's contention (Pet. 23-24), *United States* v. *Lewis*, 837 F.2d 415, 417 (9th Cir. 1988), does not hold that the prosecutor's statements made in explanation are relevant to the existence of a prima facie case; rather, the

3. Finally, petitioner's contention (Pet. 25-30) that the prosecutor's explanation was insufficient does not warrant this Court's review because that issue is not presented on this record and was not decided by the court of appeals. Where no prima facie case is made out, no inquiry into discriminatory motive is required. Therefore, the prosecutor's failure to provide a clear and specific explanation for his challenges would not be a ground for relief. Only if the defendant carries his burden to establish a prima facie case—thereby raising an inference of discrimination—does the burden shift to the prosecution to articulate reasons. Because the court of appeals correctly held that petitioner did not carry that burden, the judgment does not depend on whether the prosecutor's reasons would pass a strict *Batson* analysis. *United States* v. *Walton*, 908 F.2d 1289, 1298 (6th Cir. 1990).

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court merely accepted that contention for the sake of argument, and found that the particular explanations were race-neutral. Nor did *United States* v. *Clemmons*, 892 F.2d 1153, 1156 (3d Cir. 1989), cert. denied, 110 S. Ct. 2623 (1990), find such statements relevant to the prima facie case. The court said only that "[i]f the prosecutor's explanation raises more concern than it puts to rest, courts cannot effectively close their eyes to that fact by simply deciding that the defendant has not made out a prima facie case." 892 F.2d at 1156. Unlike the explanation in *Clemmons* (that the prosecutor struck a black juror because the juror was Hindu), the explanation here did not raise additional concerns. See Pet. App. 35a n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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